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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. HARDY MILLER III, Defendant and Appellant.	B233624 (Los Angeles County Super. Ct. No. YA075706)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric C. Taylor, Judge. Affirmed.

California Appellate Project and Jonathan E. Demson, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Hardy Miller III appeals from the judgment entered following his pleas of no contest to two counts of possession for sale of cocaine base (Health & Saf. Code, § 11351.5) and his admission that, during the second count, he had been released from custody on bail or his own recognizance (Pen. Code, § 12022.1). The trial court sentenced Miller to 7 years, 4 months in prison, suspended imposition of sentence and placed Miller on probation for a period of three years. After a contested hearing, it was determined that Miller had violated the terms of his probation, probation was revoked and the 7 year, 4 month sentence was placed in full force and effect. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*.

At approximately 12:16 a.m. on July 31, 2009, Los Angeles County Deputy Sheriff Douglas Herb was on duty in the vicinity of 1709 Imperial Highway in Los Angeles. Herb and his partner, Deputy Jordan, stopped Miller for a traffic violation and, during the stop, Jordan searched Miller. During the search, Jordan recovered from Miller "two plastic baggies[,] each containing an off-white rock like substance resembling rock cocaine." In addition, Jordan found in Miller's possession $200 in U.S. currency, in various denominations.

Herb read to Miller his *Miranda*[1] rights and Miller indicated that he understood them. He agreed to speak to the deputies and told them that he possessed the rock cocaine "in order to sell it to help support his family."[2] Herb, an experienced narcotics officer, was of the opinion that Miller possessed the rock cocaine for the purpose of sale.

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1 *Miranda v. Arizona* (1966) 384 U.S. 436.

2 It was stipulated that the substances recovered by the officers were tested by Victor Wong, a senior criminalist, on August 3, 2009. They were determined to contain approximately 5.11 grams of a solid substance containing cocaine in the base form.

Herb based his opinion on the "quantity" of cocaine possessed,[3] that Miller had no paraphernalia in his possession with which to use the cocaine, that Miller had $200 in his possession, that Miller did not appear to be under the influence of a narcotic or any other substance and that Miller indicated he sold the cocaine to help support his family.

At approximately 7:30 a.m. on November 8, 2009, Los Angeles Deputy Sheriff Juan Carlos Parra was on duty in the area near 106341 Vermont Avenue in Los Angeles. As he drove into the entrance to the parking lot of the Paradise Inn, Parra and his partner, Deputy Lopez, saw Miller standing next to a vehicle. After they saw Miller discard something, which then dropped to the ground, the deputies got out of their car and detained Miller. Deputy Lopez recovered the dropped object: "a plastic baggie containing an off-white rock like substance."[4] There were three rocks: one large and two small. It was Parra's opinion that the cocaine "was intended for sales." Parra based his opinion on the quantity of cocaine possessed. "[I]t is far greater than the quantity [one would] possess[] for . . . personal use." According to Parra, the average dose is .05 grams. Miller was in possession of roughly 80 doses. In addition, he was carrying a cellular telephone and "money in denominations consistent with street level sales."

2. *Procedural history.*

On March 1, 2010, Miller was charged by information in case number YA075706, with two counts of felony possession for sale of cocaine base in violation of Health and Safety Code section 11351.5. In count 1, it was alleged that the offense occurred on July 31, 2009. Count 2 alleged that the offense occurred on November 8, 2009. It was further alleged as to count 2, that, at the time of the commission of the offense, Miller was

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[3] In all, there were 14 pieces of cocaine, all "approximately the same size and denominations which is indicative of street level narcotic dealers for quick and easy hand to hand transactions."

[4] It was stipulated that the substance inside the baggie "was tested by Vickie Claussen, a senior criminalist, on November 9, 2009 and found to contain approximately 4.26 grams of [a] solid substance containing cocaine in the base form."

"released from custody on bail or [his] Own Recognizance in Case Number YA075706 within the meaning of Penal Code section 12022.1."

On October 8, 2010, Miller filed a *Pitchess*[5] motion with regard to count 2 requesting all complaints regarding acts of "aggressive behavior, violence, excessive force, or attempted violence or excessive [force], racial bias, gender bias, ethnic bias, sexual orientation bias, coercive conduct, violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, illegal search/seizure; false arrest, perjury, dishonesty, writing of false police reports, writing of false police reports to cover up the use of excessive force, planting of evidence, false or misleading internal reports including but not limited to false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude within the meaning of *People v. Wheeler* (1992) 4 Cal.4th 284 against Los Angeles County Sheriff's Deputies J.C. Parra" and A. Lopez.

After some discussion regarding the broad nature of the motion, the prosecutor argued that "first, there [were] no allegations against a deputy of using force against this defendant and, second, the charge against [the defendant] is possession of cocaine for sales which is completely irrelevant to force complaints. . . . [¶] . . . [¶] . . . [W]e would reiterate that the declaration is insufficient because there is no alternative actual scenario that is plausible offered in the declaration. The declaration merely denied that defendant discarded an item as he was walking towards the patrol vehicle and that's not sufficient to warrant *Pitchess* material." The trial court responded, "Doesn't it imply, though, that it was planted?" In response, the prosecutor indicated that "[t]here is no explanation as to where the drugs came from or why the deputies would particularly pick out the defendant and there's no explanation as to the defendant's own conduct." Defense counsel, who was standing in for counsel regularly assigned to the case, indicated that counsel did "deny the entire incident report and she [did] give [a] sufficient, in [counsel's] opinion,

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5 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

factual scenario to justify granting of the motion. [¶] Just to speak to counsel about the use of force, . . . it is relevant because it does tend to show a certain habit or character that is – which goes to the person's moral turpitude."

At the hearing held on the motion, the custodian of records for the Sheriff's Department read to the trial court all complaints which had been made against both deputies. After the court listened to the evidence, some of which was given in great detail, the court concluded "there was nothing responsive" to Miller's request.

Miller then brought a motion to sever count 1 from count 2, asserting that they were two separate arrests involving unrelated incidents and four different police officers. He indicated that there was "absolutely no evidence that these [matters involved] anything more than two unrelated incidents. [There is] no evidence that this is a part of some type of grand scheme. There are absolutely no witnesses in common [and] no evidence in common. [They occurred] three to four months apart [at] different locations . . . ."

With regard to the motion to sever, the People argued that there was "absolutely nothing impermissible about this [case]." The prosecutor continued, "If you can't consolidate these two cases, what cases could you? They are not only the same class of crime, they are literally the same crime . . . ." After hearing further argument, the trial court denied the motion to sever.

At proceedings held on January 4, 2011, both counsel announced that they were ready for trial. The prosecutor then indicated that an offer had been submitted on May 18 for three years on both counts. Although he had a long "string of misdemeanors" indicating that he is a drug user, Miller indicated that he wished to make a counteroffer. Defense counsel stated that Miller had never been to state prison and he had had one trial, in 1994, in which he had been acquitted. Counsel further indicated that Miller is "working now. He is trying to support his family." Counsel requested "[s]ome kind of suspended sentence perhaps or . . . a grant of probation."

After a discussion off the record, the trial court indicated that it had spoken to both sides about the program at Delancey Street. The People objected, believing that Miller should serve some time in prison. However, the trial court indicated that if Miller was accepted to Delancey Street and he wanted to participate in that program, the court would impose a term of 7 years, 4 months, suspended.

After discussing the matter with his family, Miller decided to accept the court's offer. The trial court responded, "Okay. He is going to plead to everything. I will take the plea now. He needs to write to Delancey Street. If he doesn't get in, we can set it aside."

After waiving his right to a jury trial, his right to confront and cross-examine the witnesses against him, the right to present a defense, the right to use the subpoena power of the court to obtain witnesses or evidence on his behalf at no cost to him, and the right to remain silent, Miller "agreed that [he] would plead open to the court; [that he would] receive a [two-year] drug treatment program through Delancey Street . . . [¶] . . . [a]nd that [he would] have 7 years [4] months suspended time over [him]."

Miller pled no contest to two counts of possession for sale of cocaine base in violation of Health and Safety Code section 11351.5 and admitted that the second count had been committed while he was out on bail or his own recognizance pursuant to Penal Code section 12022.1. The trial court placed him on probation, then advised him that should he violate a term of probation he would be "subject to having that 7 years [4] months imposed [in state prison]."

The trial court continued the matter for 30 days "to see if [Miller was accepted] into Delancey Street." If he was not, Miller might still be able to accept the People's offer of three years and, if not, he would go to trial. Finally, the trial court warned Miller that, should he commit "any offense while . . . out pending sentencing that [he] would lose the benefit of [his] plea and would likely be sentenced to the maximum term available to [the] court, which would be" 8 years, 4 months.

On January 28, 2011, Miller's counsel addressed the trial court and stated: "[He] was referred to Delancey Street earlier this week. He went there and they tentatively accepted him, but they said they think he should go to a detox prior to . . . being admitted into such a strenuous work program. I'm not as familiar with Delancey Street as you are, but I thought that was part of what they did." As he did not have a letter accepting him to the program, the trial court concluded that he had not been accepted. Counsel agreed, but indicated that, at the Public Defender Department, they have paralegals who "find programs for people." Counsel continued, "If they think that he is somebody that can benefit or become eligible, we do have resources to find him a place to get him ready to go in."

The prosecutor indicated that "this was an open plea over the People's objection. It was an allegation of sales. . . . [¶] Apparently the defendant has been back to Delancey Street and it would have been apparent to [him] that he needed to come back [to court] with an acceptance letter, and it seem[ed] highly unusual that he would not have [one] if they intended to accept him. I don't think that he has satisfied the conditions of the open plea." Defense counsel responded, "It's not [Miller's] fault that they don't consider him to be suitable at this time. [¶] So just because these are [sales] charges does not . . . mean he doesn't have addiction issues himself. So I don't know if he is saying it to make it seem like he's purposely not being admitted or telling the Delancey Street people he has some other issues, but there have always been drug usage issues. And his record – in fact, all but these two [cases involve] issues of personal use."

After a discussion between the trial court, defense counsel and Miller, it was determined that Miller would have an interview at Delancey Street the following Tuesday. The trial court then spoke with a representative from Delancey Street and indicated, "[H]e expects [Miller] there in the a.m. on Tuesday and he will have an answer to me by the afternoon. So I want [Miller] back here on the 3rd and, if he is not accepted into the program, the plea is off and we will move forward."

On February 3, 2011, the trial court indicated it had received a letter accepting Miller to Delancey Street. As he was required to report to Delancey Street on the day of sentencing, the trial court set sentencing proceedings for February 8, 2011. On that day, the trial court awarded Miller three years formal probation, two years of which were to be spent in Delancey Street. Miller was ordered to pay a $200 restitution fine (Pen. Code, § 1202.4, subd. (b)), a stayed $200 probation revocation restitution fine (Pen. Code, § 1202.45), a $40 security fee (Pen. Code, § 1465.8, subd. (a)(1)), a $30 "new conviction fund fine" (Gov. Code, § 70373), a $50 lab fee (Health & Saf. Code, § 11372.5) and a $150 drug program fee (Health & Saf. Code, § 11372.7). The trial court read to Miller the conditions of his probation, including that he was to report to Delancey Street within 24 hours.

At a hearing held on February 14, 2011, a warrant which had been issued for Miller's arrest was recalled. At sentencing, the trial court had failed to suspend the prison term and, as Miller did not have a minute order demonstrating that, he had been unable to enroll in the program at Delancey Street. The warrant had been issued because, instead of returning to court to obtain such a minute order or attempting to check into Delancey Street, Miller had gone to speak to a detective at a sheriff's station. He apparently "went there and volunteered to work with them in hopes that he would somehow be able to work . . . off [his case]." The prosecutor had not told him to do that, his counsel had not told him to do that and the trial court had not told him to do that.

The trial court determined that the sentence should be suspended and that Miller should enroll at Delancey Street. The court stated that "the order of the court is as it is and it stands. I'm not sure what happened to make [Miller] think he didn't think he needed to go to Delancey Street or at least come back to the court. [¶] . . . [¶] The question is whether or not he is in violation [of probation] for not going to Delancey Street." The trial court determined it would put the matter over "for proof of enrollment [or the] setting of [a] violation. You all can talk to the detective and, if the detective told him not to go [to court or Delancey Street], that's fine, I won't find . . . a violation

because it could have been confusing. But there was nothing confusing about what the court said for him to do and I put [sentencing] off so that he would have time to get his affairs in order so that he [could] go to Delancey Street. . . . [S]imply not to go is not acceptable. [¶] He is ordered to Delancey Street within 24 hours. . . . We will have a setting of violation." The court continued, "Because [Miller] was in contact with a detective and there was some communication with [the prosecutor's] office – and I'm not sure exactly what happened – I'm not prepared to make a finding in any regard now which is why I wanted to give you both time to figure out what exactly [Miller] was doing . . . ."

At a hearing held on February 22, 2011, the trial court indicated that Delancey Street was no longer willing to accept Miller. Defense counsel stated that, although the court had specified Delancey Street, another live-in program might suffice. The trial court indicated that the order had been for Delancey Street.

After hearing argument from both parties, the trial court indicated it intended to remand Miller. The court stated, "I'm doing this because it doesn't have a lot to do with his making other appearances in court but his failure to comply with the court's simple instructions. But for the fact that he failed to go to Delancey Street when he was told, he would have been in the program. All the efforts that we put forth to get him in that program have been all for nought at this point. . . ." When it was determined that it was too late in the day to have him remanded, Miller was ordered to appear the following day "prepared to surrender . . . ."

The following day, the trial court again indicated that Delancey Street had indicated it would no longer accept Miller. The court stated that "[t]hey had concerns about his delay in coming, . . . then subsequent to that he picked up a traffic ticket[.]" They were also concerned about his attitude – he wasn't taking the program seriously and the staff at Delancey Street believed it would "undermine the program to allow Mr. Miller to come in."

After the trial court cleared the courtroom, the detective which Miller had gone to see on February 11, 2011, testified that Miller had called the detective and indicated that he had some information about some drug dealers. Miller then told the detective that he had been arrested. The detective called the court and was told that Miller needed to go back to court to get a minute order and some paper work to submit to Delancey Street. Because the detective did not know if Miller was to report to Delancey Street that night or the following morning, he told Miller to come to the station the following morning. Miller, bearing a minute order and some other paper work, went to the sheriff's station and gave to the detective some information regarding drug dealers in the area. The detective then, after speaking with Miller's counsel, told Miller to return to court, "get [his] paperwork and go check into the program." The detective never told Miller not to go to Delancey Street.

The trial court noted that the detective had been brought to court "just to question what he told [Miller] with respect to Delancey Street, but we still have another stage, which is what to do with Mr. Miller at this point. Just to be clear, I said it yesterday, too, I intend to remand him. He is not at Delancey Street and I don't see any real good reason that he is not in Delancey Street except that he decided not to go." Although Miller went to the detective and, in a sense risked his life by giving to the detective "actual names and really specific information," the trial court noted that it nevertheless had before it a case in which Miller had been convicted and granted probation, which he had already violated. The court stated, "So the question is really what to do with him. . . . [¶] He was sentenced to Delancey Street . . . [¶] [a]nd probation. I'm not sure if I suspended time. I may have." "[Miller's] been out in the street for a long time now not doing what I've asked him to do and he's decided to make up his own probation terms by going to the [detective], trying to do something on another case and completely ignoring what I told him to do, ignoring it to the extent he's been kicked out of the program before he even got in it. [¶] . . . So we are where we are and we are right where it is." The trial court remanded Miller and set the matter for another hearing.

At proceedings held on May 6, 2011, the trial court again closed the court room and held an in camera hearing. The detective to which Miller had reported testified that he had been contacted by Miller who indicated he might be able to provide some information that would be of benefit to law enforcement. Miller indicated that he was involved in a case and committed to a program. He was not, however, sure whether it was a live-in program and, if it was, he did not wish to go. The detective contacted the court, the district attorney and Miller's counsel. All three indicated that Miller needed to "pick up some . . . paperwork."

After telling the detective that "there were some individuals that were selling narcotics that he believed [the detective] would be interested in knowing about," Miller indicated that he did " 'not want to go into [the] drug program[.]' " He indicated "he did not want to live in a program."

Later that day, the detective received a call from Miller, who stated that he had gone to the program, but that they had "turned him away . . . ." When the detective spoke with Miller that evening, it was his understanding that Miller was to go to court at some point the next day. The detective told Miller to come and see him before he went to court. The two met that morning, then spoke on the telephone three or four times after that over the next few days. Miller called the detective several times and each time he indicated that he had been told to "clear up [a] ticket he had." It appeared to the detective that Miller wished to work with him, but that he was unsure what the court would do. In addition, "the last information [the detective] had regarding Delancey Street was the day [he and Miller] met physically at the station. [The detective's] understanding was that [Miller] left there and went straight to Delancey Street with the minute order that he had. And [the detective] arrived at that conclusion because [Miller] called [the detective] that night and . . . mentioned . . . a ticket and [that was the same day the detective] received a phone call from an individual that [he] didn't recognize the name [of], [who] indicated [that] when [Miller had] told him [that] he was working with the Sheriff's Department

[he] didn't believe him, so they called [the detective's] number to speak to [him] to validate [Miller's] statements."

According to the detective, Miller never resolved the issue with the ticket. Miller informed the detective that there was a warrant issued for his arrest "because he was due back [in] court and [had not gone.]" The detective told Miller to speak with his attorney and that " 'Once [he] figure[d] out what [he] need[ed] to do, [he should let the detective] know and [they would] ultimately decide, along with the court, if [they would] even work together at all.' "

Yolanda Knight is Miller's girlfriend. Knight knew that Miller was involved in court proceedings. Knight had gone to court with Miller on the day he had entered his plea. After the court proceedings, Knight had taken Miller to the probation office to register, then to Delancey Street. An individual at Delancey Street had given Miller instructions then Miller and Knight left the facility. Knight took Miller back to Delancey Street on the following two days and each time he had conversations with some of the personnel there. Because during one conversation, Delancey Street personnel had told Miller that he must "take care of" a traffic ticket, Knight had driven him to the Long Beach Court House. The court, however, had been closed.

Miller had told Knight that he did not wish to participate in a live-in program. However, he continued to check in with Delancey Street and "he tried to take care of everything they [told] him to do . . . . Then[,] the last time he went, they just [told him that they were not] going to take him."

Miller, himself, chose to testify. He stated that, when he entered the plea, he understood that "attendance and enrollment at Delancey Street was something that [he] was supposed to do." After entering his plea, Miller went directly to the probation office and, after he was finished there, went back to the court to obtain the necessary minute order. He then went to Delancey Street. However, an individual there told him that he needed to come back with some additional paper work from the court.

Miller returned to Delancey Street the following day. However, "they found the citation ticket in [his] wallet and . . . said [he could not] be accepted" until he took care of it. Miller went "right away" to the Long Beach Court House. After waiting in line for some time, Miller was told, " 'It's too soon. This ticket is not in the system so all you [need] to do is photocopy everything, go get your insurance, registration and get the ticket signed off by Highway Patrol and put it in an envelope with [a] $50 money order and mail it.' " Miller indicated that "That's what [he] did."

Miller testified that, on the day he entered the plea, he first went to the Probation Department immediately behind the courthouse. After a couple of hours there, he went to pick up his children and to get some food. When, approximately one and one-half hours later he returned to the courtroom to get the minute order he needed for Delancey Street, the court room was locked. He decided to go to room 170, where he was able to obtain a copy of the minute order. As, by this time it was approximately 4:00 p.m., Miller went home. He planned to report to Delancey Street the following day.

On his way home, Miller received a message from the detective he had spoken with earlier. After Miller arrived at his home, he telephoned the detective, who told him to come see him the following morning.

The next morning, Miller went to the detective's office, where he spent approximately two hours. Miller went to see the detective "because [he] wanted to do something other than go to Delancey Street." When Miller told the detective that he was scheduled to report to Delancey Street, the detective said, " 'Don't go. I can cover you.' " After spending time with the detective, Miller returned home, where he remained for the rest of the day. The following day, Miller again went to see the detective. After the two drove around for a couple of hours, Miller returned home. The following day the detective telephoned Miller and told him that he was in "trouble" and that his lawyer and the district attorney were looking for him. The detective told Miller that he would call Miller's counsel and the district attorney and that Miller was to " 'sit at home [and not] move.' "

Because he believed he had a scheduled hearing, Miller returned to court on February 14, 2011. There, he received a different minute order and, the following day, went to Delancey Street. Miller indicated that he "really had no intentions on disrespecting the court and [he] was just trying to do it, the right thing, but [he] did it the wrong way so [he] apologize[d] to the court."

Following lengthy argument by both parties, the trial court indicated that, after it told Miller to go to Delancey Street, "he just decided he was going to do what he was going to do which was try to renegotiate this thing but he didn't include the court in any of it and, frankly, the court's order was that he go. . . . This is a plea that says go to Delancey Street or serve . . . four years on count 1 and the total with all the things involved came out to be 7, 4 when it was corrected." The court then imposed the suspended term, "that is 7, 4 . . . ." Probation was terminated and Miller was ordered to pay the various fines previously imposed. He was awarded presentence custody credit for 220 days.

Miller filed a timely notice of appeal on June 8, 2011.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed April 3, 2012, the clerk of this court advised Miller to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. No response has been received to date.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.